88-424

Supreme Court, U.S.
FILED
SEP 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STUART A. WILLIAMS
ECKERT SEAMANS CHERIN
& MELLOTT
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
(412) 566-6000

Counsel of Record

QUESTIONS PRESENTED

I. Joint Employer—National Labor Relations Act

A. Whether the agent which supervises its principal's employees in a manner compelled by the principal and for the benefit of the principal may be found to be a joint employer of the principal's employees.

B. If so, whether the General Counsel for the National Labor Relations Board may execute a settlement agreement with the principal which imposes primary liability for unfair labor practices committed by the joint employer solely upon the agent.

II. Burden of Proof—Unfair Labor Practices—National Labor Relations Act

A. Whether, absent any evidence of discriminatory anti-union motivation for a business decision, the burden may be placed on the employer to prove that the timing of the decision was not accelerated by the employer's prior unfair labor practice.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, Emeryville Trucking, Inc., and the respondent, National Labor Relations Board.

Petitioner Emeryville Trucking, Inc. discloses the following corporate affiliates:

1. Team Transport, Inc.
2. Team Brokerage Services, Inc.
3. Emeryville Trucking Co.
4. Rezzetano Investments

The Respondent before this Court is the National Labor Relations Board.

TABLE OF CONTENTS

Page

LIST OF PARTIES AND RULE 28.1 LIST ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The Joint Employer Issue 7

A. The Third Circuit's application of the joint employer concept to the agent of the admitted employer extends the definition of "employer" beyond the limits of the National Labor Relations Act and is inconsistent with the decisions of this Court and other Courts of Appeals..... 7

B. The decision below that the Board's General Counsel may execute a settlement agreement with one joint employer and impose total primary liability upon the second joint employer raises important and unresolved problems..... 13

Page

II. The Burden of Proof Issue 21

A. The Third Circuit's decision concerning cancellation of the second round of leases and the agency agreement is inconsistent with Section 10(c) of the Act and conflicts with decisions of this Court and other Courts of Appeals. 21

CONCLUSION 28

APPENDIX (under separate cover) 1a

TABLE OF AUTHORITIES

CASES

Page

Ace Doran Hauling & Rigging Co. v. N.L.R.B., 462 F.2d 190 (6th Cir. 1972) 10

Alladin Indus., 147 N.L.R.B. 1391 (1964) 11

Boire v. Greyhound Corp., 376 U.S. 473 (1964) 7

Drapery Mfg. Co., 166 N.L.R.B. 805 (1967) 18

Howell and Von Schaak & Co., 95 N.L.R.B. 1028 (1951) 11-12

Huntington Hospital, Inc., 229 N.L.R.B. 253 (1977) ... 12

Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362 (9th Cir. 1981) 9

Laerco Transportation and Warehouse, 269 N.L.R.B. 324 (1984) 9

N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105 (1956) ... 14

N.L.R.B. v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1954) 27-28

N.L.R.B. v. Lassing, 284 F.2d 781 (6th Cir. 1960) .. 25-26

N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961) 24-25

N.L.R.B. v. Schroeder, 726 F.2d 967 (3d Cir. 1984) ... 11

N.L.R.B. v. Transportation Management Corp., 462 U.S. 393 (1983) 22

N.L.R.B. v. United Food and Commercial Worker Union, Local 23, 484 U.S. ___, 98 L.Ed. 2d 429 (1987) 14

Ref-Chem Co., 169 N.L.R.B. 376 (1968), *enf't denied on other grounds* 418 F.2d 127 (5th Cir. 1969) 17

Page

Teamsters and Auto Truck Drivers, 253 N.L.R.B. 632 (1980) 9

United States Steel Corp., 270 N.L.R.B. 1318 (1984) ... 9

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 14

Wright Line, a Division of Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) 22

MISCELLANEOUS

N.L.R.B. Casehandling Manual, § 10130.4..... 20

N.L.R.B. Casehandling Manual, § 10636 20

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Third Circuit (Mansmann, J.) has not been reported. It is reprinted in the appendix hereto, p. 91a, *infra.*

The supplemental decision and order of the National Labor Relations Board is reported at 285 N.L.R.B. No. 132, and is reprinted in the appendix hereto, p. 76a, *infra.* The decision and order of the National Labor Relations Board is reported at 278 N.L.R.B. No. 153, and is reprinted in the appendix hereto, p. 38a, *infra.*

JURISDICTION

Invoking its jurisdiction under 29 U.S.C. § 160, the respondent National Labor Relations Board ("Board") issued a complaint alleging that the petitioner Emeryville Trucking, Inc. ("Emeryville") "and/or" Helms Express had committed unfair labor practices within the meaning of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("Act").[1] On March 24, 1986, the Board issued a Decision and Order, finding certain violations of the Act. *See* p. 38a, *infra.* On September 24, 1987, the Board issued a Supplemental Decision and Order, finding additional violations of the Act. *See* p. 76a, *infra.*

On the Board's application for enforcement and Emeryville's cross-application for review, the Third Circuit on May 11, 1988, entered a judgment and an opinion

---

[1]As will be discussed *infra,* Helms Express was subsequently dismissed from the case as a result of a settlement agreement with counsel for the Board's General Counsel.

enforcing the Board's Decision and Order, as supplemented. *See* p. 91a, *infra*. Emeryville's petition for rehearing or rehearing in banc was denied by the Third Circuit on June 9, 1988. *See* p. 96a, *infra*.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 151 *et seq.* National Labor Relations Act.

[The full text of the National Labor Relations Act is reprinted in the appendix hereto, p. 1a, *infra*.]

STATEMENT OF THE CASE

Background

Emeryville owns a fleet of tractor-trailer vehicles that it leases to various common carriers for use in the freight hauling business. Beginning in 1979, Emeryville leased its fleet of trucks to the Astro Division of Helms Express. Each tractor-trailer unit was covered by a separate written equipment lease which stated:

> The equipment which is the subject of this Lease shall be driven by an employee of [Helms Express] at all times that it is in the service of [Helms Express]... [Helms Express] expressly reserves the right to control the manner, means, and details of, and by which the driver of such leased Equipment performs his services, as well as the ends to be accomplished.

Accordingly, Helms Express hired and employed the drivers of the leased equipment.

In addition to the equipment leases, Emeryville and Helms Express entered an agency agreement. Among other

things, Emeryville agreed, as an agent of Helms Express, to manage the Helms Express freight terminal located at Warrendale, Pennsylvania. The agency agreement required Emeryville:

> To comply with all the rules, policies, and procedures from time-to-time established by [Helms Express] including, but not limited to, the control of drivers' logs, the verification of hours of service, and inspection of vehicles.
>
> * * *
>
> To advance to drivers not more than the percentage of revenue and/or other maximum amount as (Helms) may from time-to-time prescribe.
>
> * * *
>
> [T]o make no commitment . . . to any driver applicant regarding employment without the express prior approval of [Helms Express].

The agency agreement was terminable by either party at any time.

Terms and conditions of employment for the Helms Express drivers, who were members of Teamsters Local Union No. 800, were governed by the National Master Freight Agreement ("NMFA"). Helms Express negotiated and signed the NMFA. Emeryville neither negotiated nor signed the NMFA. Prior to the instant case, grievances arising under the NMFA were filed with, processed by, and defended by Helms Express.

Emeryville, as agent of Helms Express, performed ministerial tasks related to the Helms Express drivers. Thus, Emeryville dispatched drivers as provided in the NMFA; distributed Helms Express payroll checks; issued

monies for sick and vacation days as provided in the NMFA from a fund created by Helms Express; and, accepted employment applications and hired probationary employees subject to the final approval of Helms Express.

The Emeryville-Helms Express Relationship

In 1980-81, the business relationship between Emeryville and Helms Express deteriorated significantly. Among other things, Helms Express announced (and then rescinded) a decision to close a freight terminal at Gary, Indiana, which Emeryville managed pursuant to the agency agreement; opened a second freight terminal at Gary, Indiana in violation of the agency agreement and in competition with the Emeryville-managed terminal; unilaterally and without purported justification withheld three percent of the lease payments due to Emeryville pursuant to the equipment leases; and, deducted from the equipment lease payments due to Emeryville the amount of two grievance awards owed by Helms Express pursuant to the NMFA.

In an effort to resolve the differences between Emeryville and Helms Express, Emeryville agreed to permit Helms Express to operate the second Gary freight terminal. In exchange, Helms Express agreed to pay Emeryville a one percent commission on the second terminal's revenues and guaranteed that the second terminal would not solicit existing customers of the Emeryville-managed terminal. Helms Express reneged on both of these promises and refused to execute a written agreement embodying them.

The Packer Grievance and the First Round of Lease Cancellations

In early 1981, Helms Express employee Melvin Packer ("Packer") filed a grievance with Helms Express alleging a violation of the NMFA. Specifically, Packer protested that the Emeryville dispatcher acting as Helms Express' agent at the Warrendale terminal directed him to "dead-head" (operate his tractor-trailer without a load on board) from Detroit, Michigan to Warrendale.

Packer successfully pursued his grievance under the NMFA. However, Helms Express refused to pay the award, referring Packer to Emeryville. When Packer appeared at Emeryville on September 14, 1981, Emeryville, frustrated with its treatment at the hands of Helms, cancelled the leases of the equipment driven by Packer and the drivers junior to Packer. Two weeks later, Helms Express laid off these drivers.

The Agency Agreement Cancellation and the Second Round of Lease Cancellations

Following the first round of lease cancellations on September 14, 1981, Emeryville anticipated a response from Helms Express with respect to the numerous problems in their relationship. To the contrary, no response was received. On September 24, 1981, Emeryville cancelled the agency agreement and all remaining equipment leases. Helms Express acknowledged the cancellations without protest and notified its drivers of their layoff.

Based upon the foregoing, the Board initially concluded that the agency agreement and the second round of equipment leases were lawfully cancelled by Emeryville as an independent business decision. The Board specifically found that Emeryville ceased doing business with Helms

because Helms "was paying no attention" to Emeryville's continuing complaints about their business relationship. The Board stated that the second round of cancellations was separate from the first round and would have occurred regardless of the Packer grievance. *See* p. 70a, *infra.*

In its Supplemental Decision and Order, however, the Board reversed its field and concluded that the second round of cancellations also violated Section 8(a)(3) and (1) of the Act. The Board found that the first round of cancellations "accelerated" the second, stating:

> While [Emeryville's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [Emeryville] would not have continued the balance of the Helms leases to term. In these circumstances, we find the General Counsel has established that Emeryville terminated the balance of the truck leases with Helms on 30 September as a result of the unlawful 14 September layoffs. Such conduct, which caused the layoff of 30 additional drivers, must be found to violate Section 8(a)(3) and (1) of the Act, unless it can be shown that an independent intervening event caused the second round of cancellations.

See p. 79a-80a, *infra.*

In reaching its decision, the Board further stated:

> [W]e do not disturb the judge's finding, which we previously adopted, that the record fails to show any specific discriminatory motivation for the second round of cancellations. No such evidence is necessary where it has been established, as in this case, that an action adversely affecting employees' terms and conditions of employment came about as a result of unlawful acts,

rather than as a result of completely independent lawful events.

See. p. 82a, *infra.*

Yet the Board added:

In the compliance stage of this proceeding, [Emeryville] is free to introduce evidence establishing that factors other than the Packer grievance would have resulted in an earlier termination of some or all of the discriminatees and thereby mitigate its backpay liability.

See p. 83a, *infra.*

REASONS FOR GRANTING THE WRIT

I. The Joint Employer Issue

A. The Third Circuit's application of the joint employer concept to the agent of the admitted employer extends the definition of "employer" beyond the limits of the National Labor Relations Act and is inconsistent with decisions of this Court and other Courts of Appeals.

In *Boire v. Greyhound Corp.*, 376 U. S. 473 (1964), a general contractor, Greyhound, operated a number of bus terminals. Greyhound engaged a subcontractor, Floors, Inc., to provide cleaning services at the terminals. Although Floors, Inc. hired, paid, disciplined, transferred, promoted, and discharged the cleaning employees, Greyhound took part in setting up work schedules, determining staffing levels, and supervising day-to-day activities. A union filed a petition seeking to represent the cleaning employees at the terminals, alleging that Greyhound and Floors, Inc. were joint employers.

This Court framed the issue as follows:

> Whether Greyhound . . . possessed sufficient control over the work of the employees to qualify as a joint employer with Floors. . . .

376 U. S. at 481. The Court concluded that Greyhound's status as a joint employer was "essentially a factual issue." *Id.*

The rationale supporting the imposition of joint employer status on the general contractor under the facts of *Boire v. Greyhound* is sound. The general contractor possesses a clear choice. If the general contractor wishes, it may retain a true independent contractor and leave that independent contractor wholly to its own discretion with respect to the control and direction of its own employees. In that case, the general contractor insulates itself from whatever liability may arise from the unfair labor practices committed by the subcontractor.

If, conversely, the general contractor elects to participate in the control and direction of the subcontractor's employees, the general contractor cannot later disclaim responsibility for unfair labor practices committed against those employees. Having opted to become a "partner" in the direction and control of a group of employees, the general contractor becomes liable for any unfair labor practices committed by the "partnership." A contrary result would permit the general contractor to place itself in the best of all worlds—possessed of the authority to control and direct employees but insulated from liability for its actions by the presence of a nominally "independent" subcontractor.

The joint employer analysis, however, becomes fundamentally flawed when transplanted from the factual setting

of *Boire v. Greyhound* to the reversed factual setting of this case. Here, Helms Express, the principal, is analogous to the general contractor and Emeryville, the agent, is analogous to the subcontractor. The principal/general contractor in this case accepted and performed, rather than sought to avoid, the obligations of the employer. Helms Express was the signatory to the NMFA and determined the labor relations policies applicable to its own employees. Pursuant to the agency agreement, Emeryville was compelled to observe the policies dictated by Helms Express. The minimal discretion exercised by Emeryville fell far short of that exercised in many cases where the Board and the courts have declined to find joint employer status. *Laerco Transportation and Warehouse,* 269 N.L.R.B. 324 (1984); *Teamsters and Auto Truck Drivers,* 253 N.L.R.B. 632 (1980); *United States Steel Corp.,* 270 N.L.R.B. 1318 (1984).

An examination of the decisions of the Courts of Appeals reveals that the joint employer analysis simply has no place in factual contexts analagous to this case. In *Kaylor v. Crown Zellerbach, Inc.,* 643 F.2d 1362 (9th Cir. 1981), a warehouse operator leased trucks with drivers from a trucking company. The warehouse operator possessed "*full control* over the dispatch, routing, and use of its trucks and the hours of service of the drivers". 643 F.2d at 1365 (emphasis added). The trucking company, however, employed the drivers pursuant to a collective bargaining agreement and remained solely responsible for wages and benefits. *Id.*

The Ninth Circuit flatly rejected the contention that the warehouse operator was a joint employer of the drivers. The court stated:

> The business relationship of [the warehouse operator] and [the trucking company] were close and interconnected. But appellants produced no evidence of joint ownership or control of the two companies. Although [the warehouse operator] necessarily directed the drivers to some extent, the trucking company was in control of their wages, benefits, and working conditions. On this record, no issue is raised that [the warehouse company] and [the trucking company] were joint employers of the drivers.

643 F.2d at 1368.

Similarly, in *Ace Doran Hauling & Rigging Co. v. N.L.R.B.*, 462 F.2d 190 (6th Cir. 1972), the Sixth Circuit held that drivers of equipment leased by the owner to a terminal operator were employed solely by the owner-lessor, who hired, fired, and compensated the drivers. As the court stated, "[a]ny other result would greatly expand the meaning of the term 'employee' under the Act, an expansion which Congress explicitly inhibited in [the 1947 Taft-Hartley amendments]". 462 F.2d at 194.

Further, the Third Circuit failed to recognize the significant practical difficulties its decision creates for the steel hauling sector of the trucking industry or any other industry where principal-agent relationships are common. Common carriers such as Helms Express are ill-equipped to manage their own terminal operations without the assistance of agents such as Emeryville. The effect of the Third Circuit's decision will be to deter potential agents from accepting such assignments rather than expose themselves to joint employer liability for the actions of the principal.

In lieu of the Third's Circuit's misplaced reliance on joint employer principles, a proper analysis of this case begins with the language of Section 2(2) of the Act, which

provides that "(t)he term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . " 29 U.S.C. § 152(2). In interpreting Section 2(2), the Board has long held that an employer is liable for the acts of an individual agent acting under the employer's apparent authority, even if such acts are contrary to the employer's instructions. The individual agent in such cases is, in effect, the employer for purposes of fixing liability. *Alladin Indus.*, 147 N.L.R.B. 1391 (1964).

In *N.L.R.B. v. Schroeder*, 726 F.2d 967 (3d Cir. 1984), the Third Circuit addressed the importance of the agency concept to the statutory scheme enacted by Congress. As the court noted, the plain language of the statute renders "employer" status critical to the determination of Section 8(a) violations. The court found this proposition especially compelling where, as in the instant case, the contractual employer is a party to a collective bargaining agreement, stating:

> In general the party with whom the employee has reached a labor agreement, be it an individual or a corporation, does not (or cannot) speak individually. Instead, it speaks through specific persons. The NLRA recognizes this obvious fact by defining an "employer" in Section 2(2) as including agents, direct and indirect, of the employer.

726 F.2d at 970.

Relevant Board decisions demonstrate that, in situations analogous to the instant case, it is the principal alone and *not* the agent that is the statutory "employer." In the early case of *Howell and Van Schaak & Co.*, 95 N.L.R.B. 1028 (1951), owners of various commercial buildings entered into agency contracts with real estate management companies. The agency contracts, which were terminable

at will, provided that the management companies would receive a percentage of gross rent collected in compensation for the services provided. Although actual hiring and firing of the employees was handled by the management companies, veto power over those decisions was retained by the building owners. The Board found:

> It is clear that such authority as [the management companies] have over the employees involved herein stems solely from the respective contracts of agency which may be terminated at will. In view of the fact that the essential right of control over matters fundamental to the employment relationship is retained by the building owners and is exercised by [the management companies] only at the will of such owners, we find that . . . the building owners are the Employers.

95 N.L.R.B. at 1029. *See also Huntington Hospital, Inc.*, 229 N.L.R.B. 253 (1977).

In examining the facts of this case, it is plain that the acts of Emeryville which the Board found to be indicative of joint employer status are nothing more than the manifestation of Emeryville's role as Helms Express' agent. In fact, the agents in *Howell* and *Huntington Hospital* exercised far greater authority than Emeryville was found to have exercised in this case. Pursuant to the Helms Express-Emeryville agency agreement, Emeryville dispatched Helms Express' employees as required by the NMFA, to which only Helms Express was a party; advanced expense money; administered sick day and vacation funds and made payments from the funds in accordance with Helms Express' obligations under the NMFA; and, received employment applications and hired drivers subject to

Helms Express' approval. In the performance of these obligations, Emeryville operated under policies established by Helms Express.

Most significantly, the record is devoid of any evidence that Emeryville's performance of its agency obligations did not inure to the exclusive benefit of Helms Express. Each and every one of Emeryville's duties might have been as easily performed by individual supervisors, managers, or other agents employed by Helms Express. The fact that Helms Express elected to operate its business and discharge its responsibilities under its collective bargaining agreement with the union through the employment of a corporate agent cannot alter the fact that Helms Express at all times remained the sole employer of its employees under Section 2(2) of the Act.

B. The decision below that the Board's General Counsel may execute a settlement agreement with one joint employer and impose total primary liability upon the second joint employer raises important and unresolved problems.

On December 3, 1984, after commencement of the hearing on this complaint, the Administrative Law Judge ("ALJ") approved a settlement agreement between counsel for the Board's General Counsel and Helms Express. The settlement agreement provided that Helms Express would be secondarily liable for damages resulting from the first round of lease cancellations on September 17, 1981, but that Helms Express' liability would not extend beyond the cancellation of the Emeryville-Helms Express Agency agreement on September 30, 1981.

Emeryville strenuously objected to the General Counsel-Helms Express settlement agreement at the hearing

before the ALJ and at all relevant stages of the proceeding thereafter. Nevertheless, neither the Board nor the Third Circuit addressed these objections.

This Court recently reiterated that, once the hearing on the complaint begins, a nonconsenting party may challenge the settlement before the ALJ, and an appeal of the ALJ's determination is available before the Board. Judicial review of the Board's decision is authorized by Section 10(f) of the Act. *N.L.R.B. v. United Food and Commercial Workers Union, Local 23*, 484 U.S. ___, 98 L.Ed. 2d 429 (1987).

Pursuant to Section 10(f), a reviewing court must set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). Review of the Board's application of legal precepts to the facts is plenary. *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105 (1956).

With respect to the facts of this case, the overwhelming evidence shows that the purpose of Helms Express' outrageous conduct was to eliminate Emeryville as the agent of Helms Express. In so doing, Helms Express ridded itself of its obligations under the National Master Freight Agreement, a collective bargaining agreement which Helms Express negotiated and signed and by which it was bound. By approving the settlement agreement between Helms Express and the General Counsel, the Board and the Third Circuit foreclosed imposition of liability upon the true wrongdoers.

Overwhelming and unrebutted evidence of Helms Express' union animus was never discussed by the Board or the Third Circuit. This evidence included the following:

- When Packer first applied for a position with Helms Express, he was fired by Helms Express before his thirty-day probationary period expired. A Helms Express manager stated that this was due to Packer's union activities. It was only after Packer's successful prosecution of a grievance, with Emeryville's support, that Packer became a permanent Helms Express driver.

- When another prospective employee applied for a position with Helms Express, he too was fired before his thirty-day probationary period expired. A Helms Express manager stated that, like Packer, this person was fired because of his union activities.

- After Roy Haggard took over the operation of the Astro Division, he stated that drivers who were members of Local 800 would no longer be hired to drive trucks leased to Helms Express and idle trucks would only be operated under non-union contracts.

- In late 1980, after Emeryville had ordered twenty-five new trucks, Helms Express refused to permit Emeryville to lease them to Helms Express because union drivers would have to be hired to drive them. Emeryville subsequently leased the trucks to another Warrendale-based carrier, which found enough business to keep the trucks running.

- In violation of the National Master Freight Agreement, Helms Express opened a non-union terminal in Beaver Falls, Pennsylvania.

- Haggard's predecessor as head of the Astro Division was reassigned to run Gemini, a non-union contract carrier that Helms Express established secretly.

- Helms Express' parent, Ryder Truck Lines, acquired a non-union company which directly competed with the Astro Division. In 1982, after the closure of the Astro Division was complete, the Helms-Astro agents were retained by the I.U.-Ryder non-union operations.

- After the Astro Division shutdown, an officer of Helms Express stated that Haggard had been brought in for the sole purpose of closing the Astro Division.

- On September 14, 1981, there were idle trucks leased to Helms Express by a fleet owner whose trucks were domiciled at the Warrendale terminal. These trucks were idle because of Haggard's orders that no more union drivers from Local 800 be hired. Helms Express knew these trucks were available and that Packer and four others were laid off.

As the undisputed facts show, Helms Express almost certainly committed its own primary, independent violations of the Act by not transferring laid off drivers to other trucks and by refusing to pay the Packer grievance. By approving the settlement agreement, the Board deprived Emeryville of the opportunity to prove that another party was primarily liable for any harm suffered by the affected drivers.

Further, as the record makes clear, Helms Express as principal actually *condoned* its agent Emeryville's conduct. In the face of the cancellation of two rounds of equipment leases and the agency agreement, Helms Express offered no reaction but to accept Emeryville's actions. Had Helms Express wished, it could have forbidden Emeryville from taking actions which supposedly forced Helms Express to

lay off its drivers. For it was Helms Express, not Emeryville, which had the right to fire the drivers in question, a right contained in its labor agreement. Helms Express' total passivity was merely a convenient way to end the Emeryville relationship, an outcome Helms Express had instigated for approximately nine months.

With respect to the law, neither the Board nor the Third Circuit cites a single case for the startling proposition that the General Counsel may settle with one joint employer and impose total primary liability for unfair labor practices on another. Counsel for the petitioner is aware of no such authority. This void indicates how radically the present case departs from the Board's traditional practice and procedure and from basic standards of fairness.

The law which does exist in this area supports the conclusion opposite that reached, without discussion, by the Third Circuit and the Board. In *Ref-Chem Co.*, 169 N.L.R.B. 376 (1968), *enf't. denied on other grounds*, 418 F.2d 127 (5th Cir. 1969), the Board found a manufacturer to be a joint employer with a contractor hired to do work on the manufacturer's premises. The union representing the contractor's employees filed a timely charge against the contractor alleging a violation of Section 8(a)(5) and (1) of the Act. Subsequently, and more than six months after the alleged unlawful act, the charge was amended to include the manufacturer as a respondent. The manufacturer urged the Board that Section 10(b) of the Act mandated dismissal of the charge against it. The Board disagreed, holding:

> [The manufacturer's] liability under the Act cannot be considered separate and apart from that of [the contractor]. As joint employer, each is responsible for the conduct of the other and whatever unlawful practices

> are engaged in by the one must be deemed to have been committed by both .... [T]he nature of the joint employer relationship is such that the charge against [contractor] also constituted a charge against [manufacturer] for any unfair labor practices found against its co-employer.

169 N.L.R.B. at 380.

In an analogous case involving "single employer" concepts, the Board reversed the decision of an Administrative Law Judge imposing unfair labor practice liability on only one of the employers jointly and severally liable. In *Drapery Mfg. Co.*, 166 N.L.R.B. 805 (1967), two companies were found to have violated Section 8(a)(1), (3), and (5) of the Act. The Board held:

> In our opinion this limitation of affirmative responsibility to only one of the Respondents results in an order entirely inadequate to remedy the joint unfair labor practices which have been committed. Accordingly we shall amend the order so that it will be applicable to [both companies].

166 N.L.R.B. at 805.

Thus, *Ref-Chem* and *Drapery Mfg.* suggest that settlement with one joint employer is tantamount to settlement with all. Because the complaint against Helms Express was dismissed, the complaint against Emeryville must likewise be dismissed.

Alternatively, if the complaint against Emeryville is not to be dismissed, a new hearing must be granted with Helms Express as co-respondent. The inequity of proceeding against one joint employer while not proceeding against the other is even more obvious in this case than in *Ref-Chem*. Unlike *Ref-Chem*—where, at least, the

employer which was party to the labor agreement was initially charged—the admitted employer and party to the labor agreement here is released. The unfairness to Emeryville is manifest. As a result of the settlement and the Board's Order, Emeryville was primarily liable to all of the Helms Express employees for *15 months.* Emeryville's co-employer, Helms Express, was secondarily liable to a fraction of the Helms Express employees for *2 weeks.* Emeryville's basic rights to contribution and indemnity from its co-employer cannot be so easily defeated at the whim of the General Counsel.

Finally, the settlement approved by the Board and the Third Circuit in this case fails to satisfy even the Board's own procedural guidelines. It is plain that the Board's Casehandling Manual makes no provisions whatever for settlement with only one joint employer, although settlement procedures in a variety of other situations are set forth in great detail. This fact further illustrates the unprecedented and unauthorized nature of the General Counsel's actions in this case.

The Casehandling Manual does provide procedures for settlement of parallel violations of Section 8(a)(3) (by an employer) and Section 8(b)(2) (by a union). While the company and the union are not "joint" parties in the sense of the joint employer situation, the Board's 8(a)(3)—8(b)(2) procedures do provide guidance concerning the requisites of a fair settlement. The Casehandling Manual provides:

> *Joint and Several Liability:* In companion 8(a)(3) and 8(b)(2) cases growing out of the same acts of discrimination, the stipulated order may require the employer

> respondent and the union respondent jointly and severally to make whole the discriminatees. *The stipulations should generally not attempt to apportion the liability between the employer and the union....*
>
> Where one party is willing to settle, but the other respondent insists upon trial of the case, a settlement agreement may be taken from the party who is willing to settle. Appropriate provisions should be inserted in the agreement, however, to assure that the respondent or respondents signing the stipulation will bear only its or their proportionate share of the backpay liability unless efforts to obtain payment of the remaining portion of the backpay from the other respondent or respondents should fail.

N.L.R.B. Casehandling Manual § 10130.4 (emphasis supplied).

With respect to compliance with such settlements, the Casehandling Manual further provides:

> *Joint and Several Liability:* Where the backpay liability of a respondent employer and a respondent union in a companion CA-CB case is joint and several, *all reasonable measures should be taken by the compliance officer to assure that the liability is in fact borne equally* by the employer and the union.
>
> * * *
>
> In cases where all respondents indicate a desire to settle (the word "settle" is used herein to cover compliance as well), *each should pay its equal share.*

N.L.R.B. Casehandling Manual § 10636 (emphasis supplied).

Thus, even assuming that settlement with one joint employer was proper, the terms of the General Counsel-

Helms Express settlement simply cannot satisfy even the Board's own guidelines. Rather than the fifty-fifty split contemplated by Section 10130.4, the General Counsel elected to apportion *100%* of liability to Emeryville, with Helms' Express only secondarily liable for a tiny fraction of the total amount. Absolutely no attempt was made by the Board to see that Helms Express paid its "proportionate share" or "equal share."

Nor was this a case where Emeryville "insisted upon trial of the case." Emeryville was never given an opportunity to settle, at least not on the terms presented to Helms Express.[2]

In sum, because the issues surrounding settlement with one joint employer and imposition of total primary liability upon the second joint employer raise important problems not addressed by this Court or the Courts of Appeals, petitioner respectfully suggests that certiorari should be granted.

II. The Burden of Proof Issue

A. The Third Circuit's decision concerning cancellation of the second round of leases and the agency agreement is inconsistent with Section 10(c) of the Act and conflicts with decisions of this Court and other Courts of Appeals.

The resolution of unfair labor practice charges arising under Section 8(a) (3) of the Act involving so-called "dual motive" discharge or discipline—that is, discharge or discipline in which the decision to discharge or discipline an employee may be motivated by opposition to protected

[2]Of course, the General Counsel could not offer precisely the same deal to Emeryville as it did to Helms Express lest both alleged joint wrongdoers be secondarily liable.

activity or by legitimate business reasons, or both—is governed by the legal standard set forth in *Wright Line, a Division of Wright Line,* 251 N.L.R.B. 1083 (1980), *enf'd on other grounds,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982). The Board's *Wright Line* analysis was approved by this Court in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Under the *Wright Line* test, the General Counsel must initially make out a *prima facie* showing of discriminatory discharge by supporting the inference that protected conduct was "a motivating factor" in the employee's decision. Only if the General Counsel establishes a *prima facie* case, the burden shifts to the employer to show that the discharge or discipline would have occurred even in the absence of the protected activity. *Wright Line, supra* at 1089.

The ALJ expressly analyzed whether activity protected by the Act motivated Emeryville to cancel the second round of truck leases and the agency agreement. As a result of that analysis, the ALJ found no violation of Section 8(a)(3) and (1) of the Act:

> [O]nce Emeryville discriminatorily cancelled the first round of leases, the second round of leases and the agency agreement were cancelled as an independent business decision . . . [O]n the second round of lease cancellations, Emeryville threw in the towel on Helms because Helms was paying no attention. I see it as a business decision that is separate from the first round of cancellations and that "would have taken place even in the absence of the protected conduct". *Wright Line,* supra, 251 NLRB at 1089. Other than surmise that the timing of the second round of the cancellations ten days later was to thwart a Packer grievance

> or had other anti-union animus, there is *no record support* for finding that the second round was not done out of frustration with Helms, which had made no effort to reconcile the differences on which Emeryville had been seeking redress since July. Once the Packer grievance triggered the first round of cancellations, there is *no knowing* when the second round would have come, if at all.

See p. 70a, *infra* (emphasis added).

However, the Board's supplemental decision, enforced by the Third Circuit, held that the second round of cancellations was "accelerated" by the first:

> While [Emeryville's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [Emeryville] would *not* have continued the balance of the Helms leases to term. In these circumstances, we find the General Counsel has established that [Emeryville] terminated the balance of the truck leases with Helms on 30 September as a result of the unlawful 14 September layoffs. Such conduct . . . must be found to violate Section 8(a)(3) and (1) of the Act, unless it can be shown that an independent intervening event caused the second round of cancellations.

See p. 79a-80a, *infra* (emphasis added).

This analysis is directly contrary to the mandate of Section 10(c) of the Act, which requires that *each* independent unfair labor practice be proven by "a preponderance of the testimony taken by the Board." 29 U.S.C. § 160. The decisions of the Third Circuit and the Board literally obliterate the *Wright Line-Transportation Management*

requirement of the *prima facie* case of unlawful discrimination. Based upon a finding of one unfair labor practice—the first round of cancellations—the Third Circuit and the Board inferred a *prima facie* case in a second independent complaint. Under the Third Circuit's reasoning, prior violations by an employer relieve the General Counsel of the burden of establishing a *prima facie* case for future violations, imposing upon the employer the burden of *disproving* the charges.

To the contrary, the *prima facie* case requirement is neither relaxed nor excused by the fact that the timing of the employer's decision, and not the decision itself, is alleged to be unlawful. The burden is on the General Counsel in this case to prove that the second round of cancellations was accelerated. It is *not* Emeryville's burden to show that, but for an earlier unfair labor practice found by the Board, the cancellations would not have occurred later.

In the absence of clear evidence of anti-union animus, the Courts of Appeals simply refuse to find that a lawful business decision was accelerated. In fact, even if such evidence is present, some Courts of Appeals have declined to adopt the theory that a lawful decision, even if accelerated, constitutes an independent unfair labor practice. An examination of these cases is instructive in the instant matter.

In *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), the employer demonstrated lawful reasons, including inadequate facilities, high costs, and frequent employee turnover, necessitating the closure of its existing plant and relocation to new quarters. Prior to a final decision to relocate, however, an election was conducted and a union was certified as collective bargaining representative

at the existing plant. Approximately one month later, the employer completed the move. The Board found that the employer's decision violated Section 8(a)(3) and (1) because it was accelerated by the union activity. 293 F.2d 173-74.

The Second Circuit denied enforcement. It held:

> In those situations where a change or discontinuance of business operations is dictated by sound financial or economic reasons the courts have refused to find that § 8(a)(3) has been violated even though the employer action may have been accelerated by the union activity . . . It is our view that the record before us does not support the inference drawn from it by the Board that Rapid's move was motivated by the desire to avoid its obligations to Union. All of the evidence points to motivation for sound business reasons. Though there may have been animosity between Union and Rapid, animosity furnishes no basis for the inference that this was the preponderant motive for the move when convincing evidence was received demonstrating business necessity. The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operations.

293 F.2d at 174-75.

In *N.L.R.B. v. Lassing,* 284 F.2d 781 (6th Cir. 1960), *cert. denied,* 366 U.S. 909 (1961), the employer studied its method of delivering gas with its own employees. The employer determined that such delivery should be performed by common carrier in the event that *any* excess costs were incurred. At that time the employer knew that

its truck licenses expired on a certain date and that delivery services would not be continued beyond that date. Prior to the final decision, a union requested recognition and a meeting for purposes of collective bargaining. The day prior to the first scheduled meeting, the employer announced that delivery would thereafter be performed by common carrier, and the drivers were laid off. The Board found that the employer violated Section 8(a)(3) and (1) by accelerating the proposed change in operations on account of union activity. 284 F.2d 782-83.

The Sixth circuit denied enforcement. After reiterating that a change in operations motivated by financial or economic reasons is not an unfair labor practice, the court concluded:

> Fundamentally, the change was made because of reasonably anticipated increased costs, regardless of whether this increased cost was caused by the advent of the Union or by some other factor entering into the picture. This did not constitute discrimination against the three employees with respect to their tenure of employment because of membership in the Union, within the provisions of Section 8(a)(1) and (3) of the Act.

284 F.2d at 783.

Significantly, the burden in *Lassing* remained with the General Counsel to prove that the layoff was, in fact, accelerated; the court refused to require the employer, as the Board did in the instant case, to prove that the layoff would *not* have occurred later (for example, on the date of the license expiration) absent any union activity. The *Lassing* result is sound for two reasons. First, it comports with Section 10(c) of the Act, 29 U.S.C. § 160(c), which requires that each unfair labor practice be proven by a

preponderance of the evidence. Second, it comports with the fundamental premise that it is virtually impossible to prove a negative proposition; by requiring an employer to conclusively show that, for whatever reason, something would *not* have happened, the Board requires proof no employer can ever provide.

Finally, in *N.L.R.B. v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954), the employer terminated its newspaper delivery employees and established a network of independent contractors to deliver newspapers. The Board found that, although economically motivated, the conversion was accelerated on account of the employees' concerted activity. 211 F.2d 851.

The Fifth Circuit denied enforcement, holding:

> We do not think that, because the respondent accelerated the change-over in order to avoid anticipated union interference, it necessarily follows that the original decision to change was to defeat union organizational efforts. It is the motive for the decision to change-over that is material to this controversy rather than the motive for accelerating the change-over.

211 F.2d 854.

Further the court addressed the particular sensitivity of reconciling lawful, economically-motivated business changes with the mandates of the Act. In a passage equally pertinent to the instant case, the court stated:

> When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can

> be set aside by the board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case.

211 F.2d 854-55 (footnote omitted).

As all of the preceding cases make clear, this case requires an independent showing, based upon a preponderance of the evidence, that the cancellations of the second round of leases and the agency agreement were unlawfully accelerated. Because the General Counsel failed to produce, and the Administrative Law Judge, the Board, and the Third Circuit failed to find, such evidence, Emeryville's actions were lawful.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

. . . . . .

STUART A. WILLIAMS

ECKERT SEAMANS CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Counsel of Record

September 7, 1988

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF SERVICE

I, Stuart A. Williams, a member of the Bar of this Court, hereby certify that on the 7th day of September, 1988, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board, office of the General Counsel, Washington, D.C. 20570. I further certify that all parties required to be served have been served.

.....

STUART A. WILLIAMS

ECKERT SEAMANS CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Counsel of Record